SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ROBERT REED **PART** 43

Justice

----------X

EZRASONS, INC.,AS A SHAREHOLDER OF BARCLAYS PLC DERIVATIVELY ON BEHALF OF BARCLAYS PLC,

Plaintiffs,

- v -

SIR NIGEL RUDD, et. al.,

Defendant.

----------X

INDEX NO. 656400/2020

MOTION DATE 04/26/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 64

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is ordered that the motion is decided pursuant to the attached so-ordered transcript.

05/04/2022
DATE

ROBERT REED, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[X]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 43

EZRASONS, INC., as a shareholder of BARCLAYS PLC derivatively on behalf of BARCLAYS PLC,

Plaintiff(s),

- against -

SIR NIGEL RUDD, SIR DAVID WALKER, SIR JOHN SUNDERLAND, SIR MICHAEL RAKE, LORD GERRY EDGAR GRIMSTONE, REUBEN JEFFERY III, DAMBISA MOYO, STEPHEN THIEKE, ANTONY JENKINS, FRITS D. VAN PAASSCHEN, MARCUS AGIUS, ROBERT DIAMOND, JR., DAVID BOOTH, CHRISTOPHER LUCAS, FULVIO CONTI, SIMON FRASER, STEPHEN RUSSELL, JOHN MCFARLANE, NIGEL HIGGINS, JAMES "JES" STALEY, CRAWFORD S. GILLIES, MATTHEW LESTER, MICHAEL ASHLEY, TIMOTHY J. BREEDON, SIR IAN M. CHESHIRE, MARY ANNE CITRINO, MARY ELIZABETH FRANCIS, TUSHAR MORZARIA, DIANE L. SCHUENEMAN, MICHAEL ROEMER, TIMOTHY "TIM" THROSBY, C.S. VENKATAKRISHNAN, ROBERT LE BLANC, THOMAS KING, JOHN CARROLL, JERRY DEL MISSIER, JUDITH SHEPHERD, JOHN S. VARLEY, ROGER JENKINS, THOMAS L. KALARIS, JONATHAN HUGHES, MARK HARDING, RICHARD RICCI, MITCHELL COX, ANDREW TINNEY, LAURA PADOVANI and BARCLAYS CAPITAL INC.,

Defendant(s).

INDEX NUMBER:

656400/2020

MOTION

Microsoft Teams
April 26, 2022

B E F O R E :

HONORABLE ROBERT R. REED,
Justice of the Supreme Court

LL

A P P E A R A N C E S :

For the Plaintiff(s):

BOTTINI & BOTTINI, INC.
7817 Ivanhoe Avenue
La Jolla, New York 92037
BY: JAMIE BASKIN, ESQ.
CLIFFORD ROBERT, ESQ.
ALBERT CHANG, ESQ.

For the Defendant(s):

SKADDEN, ARPS, SLATE, MEAHGER & FLOM LLP
One Manhattan West
New York, New York 10001
BY: LARA FLATH, ESQ.
BORIS BERSHTEYN, ESQ.
SCOTT MUSOFF, ESQ.

LA TONIA LEWIS, RMR, CRR
SENIOR COURT REPORTER

LL

THE COURT: If I could have appearances, Plaintiff first.

MR. ROBERT: Good morning, your Honor. Clifford Robert along with Albert Chang and Jamie Baskin for the Plaintiff. Mr. Baskin, will be doing the argument this morning. Bottini & Bottini firm.

THE COURT: For Defendants?

MS. FLATH: Good morning, your Honor. Lara Flath from Skadden Arps on behalf of the moving Defendant. Also with me on video are my colleagues Scott Musoff and Boris Bershteyn. There may be a few others in the waiting room if your Honor is able to admit everyone else.

THE COURT: I've admitted everyone.

MS. FLATH: There we go. They're probably below. I believe, we also have a representative from Barclays on the line, your Honor, on the video.

THE COURT: Okay.

MS. FLATH: Thank you.

THE COURT: Some people are camera shy.

Go ahead, counsel.

MS. FLATH: Thank you, your Honor. On behalf of the moving Defendants which includes Barclays Capital Incorporated along with the six individual Defendants who do not challenge personal jurisdiction. We're here today on the Motion to Dismiss the complaint. Plaintiff is a

litigant that has sought to bring multiple of these derivative actions in New York State Court purportedly on behalf of foreign domiciled corporations against this company's current and former directors and officers.

Now, there are a number of reasons that we've raised in our motion as to why this case should and can be dismissed, but with the Court's permission, we would like to focus first upon the issue of standing under English law and two decisions that provide a roadmap for which this case should be dismissed without leave to replead. Those are the *City of Philadelphia v. Winters*, which related to standard charters derivative suit that was just decided in February of this year, by Justice Driscoll in Nassau County and the and *City of Aventura Police Officer's Retirement Fund versus Arison*. The Carnival derivative suit decided and dismissed by Justice Cohen in this court. Both of those cases involved derivative suits brought on behalf of UK incorporated companies, brought in New York State Court, and we respectfully submit are directly on point.

In assessing the issue of standing, the internal affairs doctrine dictates that claims regarding the relationship between the corporation, its directors, and its shareholder are governed by the substantive law of the country of incorporation. New York Courts routinely apply the internal affairs doctrine in derivative actions such as

LL

this. Now, because Barclays, PLC, which is the sole nominal Defendant is incorporated in the United Kingdom, English law governs the substantive question of the Plaintiff's standing to bring this derivative action. And regardless of whether the Plaintiff is bringing its claims under English Common Law or the UK Companies Act, only members of a corporation have standing to assert a shareholder derivative claim. This proposition is supported both by the testimony of Barclays English law expert Mr. Martin Moore, as well as the *Arison* decision from Justice Cohen.

Now, being a member of a corporation in the United Kingdom is not just owning shares, an individual has to also be entered in the register of members. Here, Plaintiff has conceded that it is not a registered member. And that admission can end the entire inquiry just as it did in *Arison*. In *Arison*, Justice Cohen considered this issue in connection with a derivative suit brought pursuant to the UK Companies Act which is what Plaintiff urges should be done here. And Justice Cohen held that the membership requirement is a substantive limit on shareholder standing to assert a derivative claim, it is not merely a procedural hurdle, thus New York Courts are obliged to apply it under the internal affairs doctrine.

And as a result because plaintiff cannot satisfy that requirement, it does not have standing to bring these

claims and this case should be dismissed. The same result should apply even if Plaintiff is proceeding under English Common Law as Defendants argued. Mr. Moore explained this and, again, Plaintiff does not dispute that under English Common Law, one must be a member to assert a shareholder derivative suit. So, respectfully, your Honor, we would submit that that is enough. The case should be dismissed for a lack of standing. We would also submit --

THE COURT: Give me the citation on the *City of Philadelphia* case with Justice Driscoll.

MS. FLATH: Absolutely, your Honor. That is Index Number 601438-20. And we submitted it to your Honor as well as in our docket entry NYSCEF 40 with a decision attached at 41.

THE COURT: Does it have any Westlaw or Lexis?

MS. FLATH: It does not as of this morning, your Honor.

THE COURT: Okay.

MS. FLATH: And that was issued just in February of 2022.

THE COURT: Okay. Go ahead.

MS. FLATH: Now, your Honor, respectfully, this is not a situation where we believe that leave to amend should be granted to allow Plaintiff to cure this defect. Even if Plaintiff could somehow establish that it is a

member, which it is not, that standard -- that Justice Driscoll decision, the *City of Philadelphia* remains on point. In that case the plaintiff actually did become a member during the pendency of the motion to dismiss, but that was still not enough to confer standing to pursue a derivative claim under English law. Now, just to level set the Companies Act versus English Common Law for a moment, we set forth in our motion that because Plaintiff has chosen to bring suit in New York, he is proceeding -- excuse me, it is proceeding outside the Companies Act which applies only to suits that are brought in England and Wales. Because the Plaintiff chose to file here and is not proceeding under the Companies Act, it must establish that it then has standing under English Common Law to bring this derivative suit.

Plaintiff in opposition claimed that there was no support for this position and it was effectively the *ipse dixit* of Mr. Moore our English law expert. But this situation, is exactly the circumstance that Justice Driscoll in the *City of Philadelphia* case faced and this is exactly how he answered the question. Justice Driscoll carefully parsed the exact question that had been left open by the Second Department in the *Mason-Mahon* case, which involved a derivative suit brought on behalf of several HSBC entities, also in Nassau County. The question that was left open as Justice Driscoll articulated and he had had that original

decision in *Mason-Mahon,* so unsurprisingly he parsed that very closely. Whether English common law governs the Plaintiff's standing to maintain derivative claims on behalf of an English company in a New York Court because the judicial permission requirement does not apply outside of the United Kingdom. And what Justice Driscoll found through his analysis is that, yes, English Common Law does apply, thus, Plaintiff must satisfy one of the exceptions to the English Common Law rule of *Foss v. Harbottle,* which sets forth a limited number of exceptions for which a shareholder may bring a derivative claim.

Now, in answering that question and reaching this decision, Justice Driscoll was persuaded by the assessment of the English law expert in that case who also was Mr. Moore. Mr. Moore opined that the UK Companies Act is a comprehensible and indivisible code, so the claim is either inside it or outside of it. And by bringing suit in New York, Plaintiff has chosen to proceed outside of it. Mr. Moore offered that same testimony in this case and Plaintiff has offered no rebuttal. Now, this outcome is not going to end up such that Plaintiff would urge that, this means he cannot -- it cannot bring any derivative suit in New York. What it means is that in order to be able to do so on behalf of an English company, they must satisfy the requirements of English Common Law articulated by *Foss v.*

Harbottle.

There is only one exception to that common law requirement that Plaintiff has argued could apply here, that is the fraud on the minority exception. And as Mr. Moore explains and as Justice Driscoll also held in similar circumstances that is not something that an English court is likely to find satisfied by Plaintiff's allegations here. In order to satisfy this exception, Plaintiff under English law must establish that the alleged wrongdoer have a high degree of control. And that means a de facto control of devoting shares of the company.

Now, as of the time of the filing of this action, Barclays PLC's directors owned approximately 0.16 percent of the company's outstanding shares, it is not a fact that has been disputed. But as a result it means that they cannot have de facto control. Plaintiffs also cannot satisfy the other requirement of fraud on minority exception. They do not plead that any benefit to the directors or officers at the expense of the company other than their standard compensation, which is not sufficient under English law. Simply put, your Honor, the *City of Philadelphia* case is on all fours here. Plaintiff, by bringing suit in New York, is proceeding outside the Companies Act and then that therefore falls under English Common Law. Because they cannot satisfy one of the exceptions to pursue a claim under English common

LL

law, they do not have standing.

We would note, too, your Honor, this is also consistent with how the First Department assessed the issue in the Davis case, *Davis v. Scottish Re*. In that case, the New York Court of Appeals held that the Cayman Islands Judicial Permission Rule was procedural. And then on remand, the First Department said because that is a procedural rule, Plaintiff's do not have to satisfy it to bring suit in New York, but they do have to satisfy common law standings and apply the *Foss v. Harbottle* exception and found in that case that plaintiff thereto had not satisfied the fraud in the minority exception. So for those reasons, your Honor, we submit that the Plaintiff does not have standing under English law to be able to pursue this. But even if Plaintiff could establish standing, we think this is still and respectfully submit this is a case that should be dismissed pursuant to the Court's discretion under the doctrine of forum non conveniens.

Plaintiff cites numerous instances of purported New York activity, but fundamentally, this case is about whether or not Barclays PLC's current and former directors and officers, breached a duty of fiduciary care owed to the corporation. Those activities and that alleged wrongdoing occurred in the United Kingdom. Barclays PLC, again, is incorporated in the United Kingdom and has its headquarters

there; that's the alleged breach. And in the circumstance of a shareholder derivative suit where the Plaintiff is seeking to step into the shoes of the corporation, that is where any alleged lost or harm would have occurred. That is a strong factor that weighs in favor of dismissing under forum non conveniens.

Similarly, the United Kingdom has an interest in the regulation and internal affairs of its corporations, whereas New York has a much more limited, if any, interest. Similarly, in this case as to others, the documents, witnesses, and the large majority of Defendants are located outside of New York. All but six of over 40 individual Defendants are outside of New York. In addition, to the nominal Defendant, of course, being a United Kingdom resident. And without question, there is an available and adequate forum, English Courts provide that forum and a number of cases have so held. Plaintiffs only response --

THE COURT: Are most of the Defendants in the United Kingdom or are they just outside of New York?

MS. FLATH: Your Honor, the majority are in the United Kingdom, but not all exclusively. And certainly there are only six that consented to personal jurisdiction in New York, the rest have reserved rights to be able to challenge that. Plaintiff's response, your Honor, is to argue that because it is a New York resident, its choice of

forum should be given the heaviest weight. But, again, because this is not a direct action being brought by a New York resident but a derivative suit, that factor receives less consideration in the analysis.

Indeed, one of the other cases that Plaintiff president and the same counsel have brought recently was dismissed by Justice Borrok in part on forum non-conveniens grounds despite Plaintiff's New York residency. Your Honor, we submit that those two reasons are certainly enough to dismiss the entire action and have set forth additional rationales and reasons for that as well, which I'm happy to continue walking through.

THE COURT: That's fine. Let me hear from your adversary. If you could unmute, Mr. Baskin. You could unmute, yourself, please.

MR. BASKIN: Can you hear me now?

THE COURT: Yes.

MR. BASKIN: Okay. Sounds like the commercial.

THE COURT: Yes.

MR. BASKIN: Jamie Baskin for the Plaintiffs, your Honor. Let me just set the stage first. This is a motion brought, as counsel said, by six New York residents on forum non conveniens grounds and other grounds claiming that it's an inconvenient forum for the six New York resident, which makes very clear sense. Five of the six

that bring the motion are former not current officers or directors, five of the six. And that's important for several reasons, first of all, because the first part of the law is that the internal affairs doctrine does not apply in cases involving former as opposed to current officer and directors; that does not apply. That's in the *Culligan* case. Also, in the *New Greenwich Litigation Trustee* case.

So as for most of the people bringing the motion and actually most of the Defendants, the internal affairs doctrine just doesn't apply. Now, the one of the six that is a current Defendant are Mr. Venkatakrishnan -- I think I have that right - is now the CEO of Barclays. He's a New York resident. And actually three of the last four Barclays PLC CEOs have been New Yorkers, with the fourth owning property here in New York and spending a lot of time here doing what CEOs of holding companies do, which is managing their operating subsidiaries.

I point out that -- in the papers we submitted -- that Barclays itself proclaimed that it is a holding company, that it is anchored -- this is a quote "Anchored in our two home markets of the UK and the US". The two home markets -- the US market is clearly anchored in New York. So the idea that Barclays PLC has nothing to do with New York is just not right.

Moving to standing. Standing is, first of all, a

choice of law issue. First of all, a choice of law issue. Defendants say, well, internal affairs doctrine trumps all and therefore English Law, we disagree. As I said, Culligan and the *New Greenwich Trust Litigation* case both says, internal affairs simply does not apply when it's former as opposed to current officers. Now, choice of law should start --

THE COURT: Why would that be? It seems that it has nothing to do with the issue. The issue is -- the issue is the Plaintiff not the Defendants.

MR. BASKIN: Well, the rationale of both those cases -- this was the question both of them addressed directly was that internal affairs governs the relations between current shareholders and current officers and directors. It didn't go into regular detail as to beyond that. But it did say that because a number of the officers, directors in those cases were former officers and directors, New York Law would apply, not the law of the state of incorporation or the nature of incorporation. And it said clearly *Culligan* said -- I'm quoting here -- "Since the internal affairs doctrine does not apply to those Defendants who are not current officers, directors, and shareholders, Bermuda Law does not apply to the claims asserted against them. You've got two First Department cases that say that pretty precisely, even if that weren't the case though the

bigger point is that starting the --

THE COURT: For the *Davis versus Scottish Re*, it's after --

MR. BASKIN: It is, your Honor, but it didn't address former versus current.

THE COURT: Everything hinges on former versus current when the issue is standing -- former versus current Defendant when the issue is standing of the Plaintiff. That's the problem, the analysis has nothing to do with the standing of the Plaintiff to pursue, whether or not they have an avenue against these former directors, the analysis is on the wrong side.

MR. BASKIN: I would submit, your Honor, the analysis has to start with choice of law and that's what *Culligan* and *New Greenwich Trustee* was talking about was choice of law. And it simply states you have a different choice of law depending upon whether you had current or former officers directives. But neither --

What Culligan addressed next, however, is even more important and that is the fact that we have a statute in New York, section 626 and section 1319-BCL that directly addressed the standing point. Stepping back, the choice of law issue ought to start with the primacy, which -- the hierarchy of the law. The restatement addresses this directly. It says, a court subject to constitutional

restrictions will follow a statutory directive of its own state on choice of law; that's section six sub one of the restatement of complex and section six sub two or the various common law rules if you don't have a statutory directive. We do have a statutory directive here. 626 -- BCL 626 not only provides a jurisdictional basis for the court, but it provides standing.

THE COURT: Not all defense on the foreign corporation is doing business in New York though?

MR. BASKIN: It does not, your Honor. Let me explain.

THE COURT: The standard there, they lay out certain things.

MR. BASKIN: If I could explain.

THE COURT: Go ahead, that's fine.

MR. BASKIN: 626 in and of itself provides for jurisdiction and provides for standing for a holder of shares or a holder of a beneficial interest in shares, either one. There is nothing in 626 that says anything about doing business in New York. Now, 1319 is an overlay. And under general rules of statutory instruction it has to have a separate purpose than 626. Some courts have said, well, 1319 provides the jurisdictional basis, but 626 does that all by itself. There is no need to add something on because 626 speaks explicitly of foreign corporation

derivative action. 626 stands on its own, in other words.

1319 does something else. It says, if you are doing business in the state, then these provisions including 626 shall apply -- shall apply. Now, the question is what is the something else that 1319 adds with the doing business requirement. Looking back to over -- through the life of the BCL since the early '60s and then its predecessors, the something else is consent. This consent idea goes back to Justice Cardozo with the *German-American Coffee* case and comes back to the *Aybar* case just last year before the Court of Appeals.

1319 is a -- 1317 like it -- are consent statutes where the state imposes a consent condition on doing business. The question is not is there a consent condition, the question is what's being consented to, that's what *Aybar* was about. What you're consenting to is less than what the plaintiff said there. What we say is that the consent is to conducting derivative litigation in New York under the rules of 626 and 627, that's a consent that is required by 1319. And with all respect, the *City of Aventura* case says, well, it just provides a jurisdictional basis, but that reads 1319 out of the law because 626 does that standing on by itself. The *City of Aventura* doesn't address what the something else is that 1319 adds to the conversation.

THE COURT: Do you have any idea why -- what

happened to the City of Aventura? Why -- was it appealed, what happened to the appeal? I don't see any followup on it.

MR. BASKIN: My understanding is that they dismissed the case rather than go through the appeal. I'm sure that's what happened. *Culligan*, this First Department *Culligan* supports this is view that 1319 and 626 must be honored. There may be issues involving standing that are not dealt with specifically in 626 and 1319. And as to other kinds of issues, maybe you go to the next level, which -- or the common law rules. But as to whether one has to have shares in his or her own name New York says no.

Do you understand almost every American retail investor owns shares as a beneficial shareholder, 90 plus percent? I mean, in the US, they're held by, you know, DTC and CD and Company. And an American holder who holds in the way that almost every American holder owns their stock cannot be a member because to be a member you have to be a direct holder. And that's really what the fight's about. If you're a direct holder, all have you to do is send a letter say I want to be on the register. And with all due respect, I do not believe that we have not conceded that we are not registered -- our client is not a registered shareholder. I think that would be a matter for discovery.

THE COURT: How can that be a matter of

discovery, that's either your client is or isn't; that's a matter of pleading.

MR. BASKIN: It's a matter of the is or isn't, is are you on a list that is not a public list. They say you're not and we haven't seen; that would be the matter.

THE COURT: Do you plead that your clients are registered shareholders, registered members?

MR. BASKIN: Yes.

THE COURT: You do?

MR. BASKIN: Yes.

THE COURT: Where? What paragraph?

MR. BASKIN: I'm going to ask my friend Mr. Chang here to pull that up as I continue.

THE COURT: Well, wait, I want to hear the answer to that before we continue.

MR. BASKIN: Okay.

THE COURT: You made a statement that's slightly contradicted by the other side, I need to know who's telling the truth.

MR. BASKIN: Give me a moment. Paragraph 30, page 19 says Plaintiffs shares are registered with Barclays and is hence a member of the company under the English Companies Act. That's the pleading, your Honor.

THE COURT: The shares are registered -- the Plaintiff's shares are registered with Barclays.

MR. BASKIN: Yes. Paragraph 30, page 19. But, again, our view is that New York was -- New York had the power, the legislature had the power to protect its citizens which, it's done through 1319 and 626 knowing that most of its citizens who hold stock both in domestic and international corporation hold stock through intermediaries.

THE COURT: Does the state have that power, it sounds like interstate commerce for foreign commerce, it seems like that is a federal issue, not nothing the states could do.

MR. BASKIN: Your Honor, it is something the states could do, if you give me a moment to --

the test there is not -- as Defendant suggests whether interstate commerce is implicated, there's a specific test from the *Pike versus Bruce Church* case. It's *90 Supreme Court 844 at 847*. And that test is picked up in New York by *Homier Air Distributing Company 90 New York 2d 153 at 158* and here's the test. Where a statute regulates evenhandedly to effectuate a legitimate local interest, local public interest and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the punitive and local benefits. That's --

When you go back to the *Airtran* case, it's discussing undue burden on the interstate commerce, not just

-- you might touch interstate commerce, undue burden, that's kind of a term of art and the term of art is explained here in the *Pike Versus Bruce Church* case. So the question is, is there a local public interest, absolutely there is and it's explained by the fact that most New York citizens and most Americans own their stock beneficially, not directly. And a rule that cuts out beneficial owners, cuts out virtually every American retail owner. Does the state have the power to say, we're going to let our citizens who are beneficial owners sue in a derivative case, yes, it does, that's a local public interest.

THE COURT: But it affects interstate foreign commerce?

MR. BASKIN: It may affect interstate foreign commerce. The question is not does it affect, but is it -- is the burden imposed clearly excessive in relation to the local benefit, it's not just does it touch it, it's a weighing process with respect, your Honor, the legislature made that --

THE COURT: If a bank in England has to answer to every lawsuit by one of millions of potential shareholders, certainly, it's a burden.

MR. BASKIN: The fact that an English bank or a Delaware bank for that matter was, you know --

Foreign means both, you know, 49 states plus the

foreign countries for these purposes have to answer derivative cases that are supervised heavily by the judiciaries, who it's not just you can run in with nothing and say nothing and you submit yourself to the supervision of your Honor. It does not seem to be the kind of burden that would fail the *Pike* test.

THE COURT: What kind of burden would there be, I think that's the biggest burden. The idea of being held to answer -- held to answer a suit for money damages in a venue that you didn't choose and that's not authorized under English law.

MR. BASKIN: Well, let me go at that backwards.

THE COURT: Okay.

MR. BASKIN: This court --

The New York Court decides the choice of law questions at the top. And the choice of law hierarchy is right there in the restatement of conflicts section six says that where you have a statutory directive of the state you follow your own state's statutory directive.

THE COURT: Procedure?

MR. BASKIN: That's not about procedure, that's about choice of law. And there is no reason why a state can't --

THE COURT: A state -- New York State can say in any case because we base our legislator, whatever new

legislator is elected every two years can say that we decide cased based on New York Law even though the case -- even though the corporation has its offices in Delaware and does business in California.

MR. BASKIN: That's been the law in New York for over a hundred years. If you look at that *German-American Coffee* case that Judge Cardozo wrote in 1915, involved a New Jersey corporation and the question was -- had to do with illegal dividends paid by the directors. In New Jersey, the state incorporation only predators had the right -- had standing to bring suit for those illegal dividends. New York gave, yet in the predecessor of one of these Article 13 statutes, New York gave the corporation itself standing to bring suit for these illegal dividends. Justice Cardozo said, yes, the substantive law of New Jersey applies, but we can decide who can bring that suit for that remedy and that's what they did. And that's the same case where he said agreeing to these restrictions and these regulations that are now in Article 13 is a condition to doing business and if you don't want the restrictions don't come here; that's the rationale.

It's been carried forward in the *Pohler's* case in the '40s by the Court of Appeals and really in the *Aybar* case just last year. Now, that case said you're wrong about what consent was given, but you're not wrong that Article 13

is a consent-driven regime. And so what you'd be doing would be trying to overcome a hundred years of New York Law by saying that the state doesn't have the constitutional power to say that its residents who have stock beneficially can sue. We submitted with -- excuse me, let me grab a little bit of water, if you don't mind.

We submitted with Mr. Chang's affirmation a white paper study done in the European union about the different ways people hold stock in different companies -- countries. They're just different regimes for holding stock. The English use a different model for stock holding than the Americans use a different model in Germany and for other places. There is no logical reason why the American stock holding model should be a roadblock to American stockholders bringing derivative suits. That's what it would boil down to is that because Americans hold true what's called a entitlement sort of a holding pattern, which is what instituted many years ago because of the number of shares out there and the difficulty of people having their own stock certificates and that sort of thing.

There is no reason why the way American holds opposed to the way English holds or Germans holds stock is all different than Americans and New Yorkers should be excluded from derivative cases. That's why, you know, choice of law, top level, statutory, directive New York made

the decision, we are going to allow in our courts beneficial owners as well as direct owners to bring derivative cases. And I submit to, your Honor, that it's to the legislator to decide is that overly burdensome as opposed to that reasonable given the fact that virtually all American retail owners are beneficial owners. The doing business -- let me go back to that part, the Court seemed interested in the doing business aspects.

Now, HSBC like this was an English bank holding company in the court until -- HSBC was both doing business both directly and indirectly in the United States and in New York. *Culligan* First Department case excuse me -- the *Airtran* First Department case speaks directly to that. Barclays PLC is doing business in New York both directly and indirectly. When I say directly, what holdings company do -- holding companies manage and finance their operating subsidiaries. And the board and senior executives of Barclays PLC manage and finance their operating subsidiaries here in the United States were their -- as they say -- two home markets. The debt markets in New York and in their presentations and their prospectuses for the debt markets. They say we're raising billions of dollars in part to fund our subsidiaries.

They also say we're going to use New York Law, but that's an argument on the side here. But that's what

they do and the executive -- three of the last four CEOs are New Yorkers, senior management spends a lot of time in and with New York providing management at oversight. And that's direct doing business. The *Airtran* case takes it a step further and says when you have a holding company operating company setup, the operating company are, in effect, the agents of the holding company because that's how the holding company does operating business. There's a fairly lengthy discussion in the *Airtran* case about that.

And that's the law in New York and in the First Department is that not every subsidiary of every company because they're different setups. The holding company, operating company setups are where the holding company's operations are done wholly through its subsidiaries and as is the case here. The law is that that is doing business both by the subsidiaries and that is doing business by the holding company parent and the overlay that the Airtran case put on it was that its doing business as an agent for the holding company principal. And there is no reason not to apply that construct to this case. I've been going quite a while, I think I'll metaphorically sit down and address the Court's questions.

THE COURT: Counsel.

MS. FLATH: Thank you, your Honor. If I may respond just briefly. First, very briefly to address that

LL

the moving Defendants should not have raised a forum non conveniens defense is directly contrary to the stipulation that the parties agreed to and that the Court's entered that's on the docket entry nine in which the parties agreed that any defendants who is not challenging personal jurisdiction would raise so-called global arguments including forum non-conveniens. So it makes complete sense for efficiency purposes and otherwise for that perspective on the first page.

Second, briefly on the point about whether or not the plaintiff is registered and whether they would have conceded that would point the Court to their opposition, which is NYSCEF Number 25 on page 16, footnote 9 that states, "Plaintiff could become a 'member', but it would be time consuming to achieve and cumbersome once achieved as modern securities market depend on indirect holdings." Your Honor that's impossible to reconcile with the fact that they're already a registered member. In addition, we submitted testimony from Hannah Elwood, which searched the registry and Plaintiff was not listed. In response to that, that is what they conceded in footnote nine of their opposition. And, your Honor, membership does matter. Under Plaintiff's theory here, New York could allow derivative actions for New York shareholders even if UK corporate law prohibited them altogether.

LL

And, in addition, in the *Arison* case, Justice Cohen directly addressed this point, the membership requirements is not plotting some procedural path or otherwise, but it is creating a substantive pre-condition for having the right to sue derivatively on behalf of a corporation, and that provides stable guidance to shareholders and even ADS, indirect holders in English companies as to the scope of their rights to bring derivative actions on behalf of the company. And the same is true for corporate officers and directors who have more than a passing interest in knowing whether and under what circumstances they will be subject to derivative suits outside the United Kingdom.

THE COURT: How do you address his argument that there is a distinction to be drawn in applying the internal affairs doctrine with respect to former directors?

MS. FLATH: Certainly, your Honor, in the *Mason-Mahon* case in which the Plaintiffs certainly cites and relies upon heavily, there were current and foreign directors of HSBC. Nonetheless, the internal affairs doctrine applied to that as well. And in *Culligan*, the facts are very different, the Court found an exception to the internal affairs doctrine because it was a Bermuda shell corporation, but the office - the employees, the conduct all of those facts at issue occurred in New York. And in the

New Greenwich case that the Plaintiff also cited, it discussed whether or not the internal affairs doctrine should apply actually to a consultant, an auditor to PWC or not. Those are all distinctions that in those circumstances allows the Court to find the internal affairs doctrine did not apply in those situation, but *Culligan* does not stand for the proposition that 1319 is a choice of law.

And, in fact, as your Honor noted earlier, the *Davis* Case or the *Scottish Re* case whichever way one refers to it applies the internal affairs doctrine to derivative corporation subsequent to *Culligan*. And in the *Blau* case, which we cite in our papers, Justice Singh specifically noted that *Culligan* was not intended to override the internal affairs doctrine. So to suggest that somehow the 2014 decision in *Culligan* should be taken despite the Court of Appeals subsequent action or otherwise simply does not apply.

Then, finally, your Honor, with respect to these provisions about doing business, the *Airtran* case certainly states that in considering which provision of in Article 13 and what standard should be applied, one should consider whether interstate commerce is affected. And, again, on that point the *Blau* case and the *David Shaev* case that we cite are both instructive. In *Blau*, Justice Singh stated that section 1319 which necessarily relates to the ability

of the Court assessing whether or not they can weigh in on the internal affairs of a corporation implicates the commerce clause. And as a result we are -- you know, we believe, your Honor that the heightened doing business requirement of New York Law should apply here, not the purposeful availment standard that Plaintiffs are arguing. In addition, after *Airtran* was decided, the Supreme Court came out with the decision in *Daimler* which holds that certainly as a matter of general jurisdiction you need more to be able to assert that a foreign parent corporation is doing business.

And, respectfully, your Honor, the points about holding meetings or otherwise having some business, we addressed that in our reply which is NYSCEF 34. But under the statute itself, 1301(b), holding meetings of directors or shareholders, maintaining or defending actions or proceedings, none of those are sufficient to establish that Barclays PLC, the UK incorporated entity is doing business. Similarly, tapping the debt market, we cite a case law on that as well, your Honor because that does not satisfy the doing business requirement. With that, your Honor, I believe, I've addressed the questions unless your Honor has other ones for me.

THE COURT: I just want to -- I just want to get your response, I'm looking at the *Blau* case and it does say

that at some point in speaking about the *Hart* -- it says *Hart* also relied on a decision from the United States Supreme Court which concluded that the law of the state of incorporation must govern a corporation's internal affairs, matters peculiar to the relationships among or between the corporation and its current officers and directors. Just --

I'm just kind of throwing that at you, but I'm just concerned because it does call for somehow a limitation at least in that sentence to the idea of the internal affairs being something focused on current directors as opposed to former directors.

MS. FLATH: Understood, your Honor. And, again, I would go back to just the *Mason-Mahon* case, which I involved current director of HSBC as well as the other instances that we've discussed where courts in this division have held that the internal affairs doctrine has applied. Certainly, current and former directors were named as defendants in the *Bayer* derivative action that Justice Borrok just dismissed applying the internal affairs doctrine and based upon German law standing as well as forum non conveniens. So that has not been held as sort of this provision in which that is the fundamental issue. And, your Honor, the cause of action that Plaintiffs are purporting to do here is that they are suing former directors based upon their breaches while they were are purported current

officers or directors. So truly fundamentally, this relates to the interest of the corporation with respect to its governing board at the time. They happened to have brought suit going back to May, 2008. So inherently, many of these individuals are no longer with Barclays PLC, if they were ever. Thank you, your Honor.

THE COURT: Mr. Baskin, looks like you want to say something, unmute yourself, please.

MR. BASKIN: Can you hear me now?

THE COURT: Yes.

MR. BASKIN: I will say something, hopefully not much. First, there's lot of reasons why the Defendants would like to wish away the *Culligan* case. They talk about, you know, things they found in briefs, but aren't in the case itself. The case stands for what it stands for, two propositions: One that internal affairs only applies to current officers/directors.

Secondly, that the 1319 626 regime cannot be ignored.

THE COURT: Now, Counsel, just getting back to that, the things that you're complaining about were about the directors when they were current, right? You're not talking about some separate special gifts that the directors got when they were -- after they left their positions. In fact, the argument -- one of the arguments that they make is

LL

simply that you're complaining about what -- the benefits or salaries the directors had while they were serving as director. So you are talking about current directors. If we're looking at -- if we're assessing the point of the internal affairs thing, we're looking at the idea of scrutinizing how a corporation deals with its directors and officers. Then what we're talking about is that corporation's actions at the time that these directors and officers were current. We're not asking --

We're not talking about some separate accommodations that are being provided that they are today giving free air travel or other perks to these directors; that's not part of your complaint.

MR. BASKIN: It is certainly correct that we are suing them for acts or omissions during the time that they were all search directors. But let's go back and look, what is the internal affair's doctrine, it is simply a choice of law rule. And what Culligan says in some of the directors were being sued for what they did when they were directors and Culligan court says, that choice of law rule doesn't apply to formers. The bigger point though is that the choice of law rule that does apply and its -- the statutory rule. Let's sit back and realize that 48 or 49 states don't have a similar rule to New York. So you'll see cases from other places that say, oh, yes, it has to be internal

affairs because that seems to be sort of a top level common law rule. But those other states don't have statutory directives that New York has. And so when you look at the hierarchy. I urge your Honor to look at restatement second of the conflicts section six. The hierarchy is first if there is a choice of law rule that is in a state statute, you follow it.

Second, in the absence of such a statutory director, here are the rules. And with respect to the internal affairs doctrine is in that second lower hierarchy rule trumped at all times by the statutory director. It is true that we entered into a stipulation. We did not in the stipulation waive the burden that the movants must meet to prove forum non conveniens. The six individuals are the ones advocating forum non conveniens, those six are residents of New York including as I say the current CEO, one past CEO, who is a New Yorker and who is a movant and there is a New York past CEO Mr. Staley, who for whatever reason is not a movant, but he lives Manhattan in the Hamptons and is another one that was one of the active wrongdoers here.

I'll say one more thing. The Norman case which we cite, second circuit case and Professor Demetz argue in the article that we cite, both say that this 1319 626 regime was intended by the legislature to be an override an,

LL

override of the internal affairs doctrine. It is fairly unique to New York and certainly the Defendants have not demonstrated to your Honor that that statute is in any way unconstitutional or any reason to ignore or avoid it. Thank you, your Honor.

MS. FLATH: Your Honor, just one last point, since you had raised the question of *Blau* and current and former directors. Note in the very first line in that case, plaintiff had attempted to sue 30 of the former and current officers and directors, so it did relate to both. And, again, because I think the point that we made at the end of just it's relating to the exercise of their obligations in the time that they were serving as a director or officer.

MR. BASKIN: And if I may, I have one last point, your Honor, too. I understand your Honor declined to grant our request for a sur-reply. Nevertheless, you want to point out that section 327(b) does limit the Court's power in relation to forum non conveniens under 327(a) and we believe that the document put before the Court in Mr. Chang's affirmation is sufficient to invoke that power limiting rule of 327(b).

MS. FLATH: Your Honor, obviously denied the motion to file a sur-reply. Certainly, we'll be happy to respond if your Honor wishes to maintain it. We maintain that it's not part of the motion here since it's not part of

a permitted sur-reply. But we'd be happy to address if your Honor would like us to. Thank you.

THE COURT: All right. The motion before me is to dismiss this case. I heard from the -- I heard from counsel, from the parties, I reviewed their papers, considered cases by my colleagues in the commercial divisions in New York and Nassau County. And it is this Court's assessment that the motion should be granted. The Court is persuaded that the reasoning of Justice' Cohen and Driscoll is sound.

And based upon the reasoning of those justices with respect to the matters, the cases that were before them, the *City of Philadelphia versus Winters*. And the *Aventura versus Arison* matter English law dictates that Plaintiff lacks standing to sue. The documentary evidence here demonstrates that there is -- that the Plaintiff is not a registered member of Barclays. There is an affidavit searching the record with respect to identifying documents -- searching the record of documents that would show who are or are not members. And to that limited extent, that affidavit I think qualifies as documentary evidence is simply identifying a document that would show one way or the other whether or not the Plaintiff is a registered member and it does not.

There is an admission by attorneys in the course

of their opposition that they could become a member which speaks plainly that they are not members. So despite the conclusory statement in the complaint, it is apparent that the Plaintiff is not a registered member. That being the case and because the membership requirement of the United Kingdom's Companies Act is a substantive provision that it had to be met here. And the shareholder of the English company failed to meet it. The shareholder lacked standing to bring the derivative claims on behalf of the company because the membership requirement was substantive limit on a shareholder standing to assert a derivative claim and not merely a procedural hurdle.

The Supreme Court is obliged to apply it under the internal affairs doctrine. The business corporation law does not override the internal affairs doctrine on the issue of standing to bring a derivative claim because it is a mere statutory predicate to jurisdiction, which simply conferred jurisdiction upon New York Courts over derivative suits on behalf of out of state corporation, but did not require application of New York Law in such suits. That's out of the *City of Aventura Police Officers Retirement Fund Versus Arison;* that's at *70 Miscellaneous 3d 234.* The Court understands that the holding for the *City of Philadelphia versus Winters* as prepared by Justice Driscoll commercial division sitting in Nassau County is similar.

LL

I understand that index number in that matter is 601438 of 2020. It is clear that to the extent English common law is argued -- I take it that the Plaintiff is not trying to argue that, but that the Defendants are hoisting it upon Plaintiff. But to the extent that English Common Law is at issue then the pleadings do not support the fraud on the minority exception given the -- that the -- in this case the -- the numbers don't add up that the directors/officers who are alleged wrongdoers here at such a minimal share of the overall interest of the corporation that they could not be imposing their will on the minority. So to the extent that the English common law will allow for standing its particular requirements are not met.

The Court doesn't accept the idea that the *Culligan* matter has somehow -- the Court doesn't accept that the *Culligan* case dictates a different outcome nor does this Court, its colleague, and Justice Cohen made clear in *Aventura Police Officers Retirement Fund versus Arison* Culligan concerned regulation of conduct within New York and did not purport to alter settled New York Law on the application of the internal affairs doctrine in breach of fiduciary duty actions. In the *Blau* case it was also noted that the First Department in *Lerner versus Prince* that substantive law of a foreign corporation's place of a corporation benefits. And *Blau* noted that nothing in

LL

Culligan would suggest the court not to follow *Lerner*. I think the Court in *Culligan* wants to change the clear precedence from *Hart* to *Lerner*, it most assuredly would have stated just that and why.

And even *Blau MD Money Purchase Pension Plan Trust versus Dimer*; it's at *215 New York Slip Op 32 909 (U)*. I will note as well that the Court of Appeals in *Davis versus Scottish Re Group Limited 30 New York 3D 247 at 253* applied the internal affairs doctrine to derivative action -- to a derivative action involving a foreign corporation. The Court also notes that the distinction that Plaintiff seeks to draw between the former and current directors is irrelevant certainly to this matter. As to the matter that -- as the actions that are under scrutiny are the actions taken by the directors at issue here when they were current directors. And so we are -- we would be asked to scrutinize the internal affairs of this English company. If we're doing that, we need to apply English law.

So for those reasons, I won't address the forum conveniens argument except that there was no waiver of the argument. But I do think that there is something to be said for the fact that this argument is being made by New York based Defendants on behalf of others is a -- maybe a little difficult to swallow. I understand intellectually, but I think it is a practical matter. It's a little difficult to

swallow. But I will base my decision on the solid reasoning of my colleagues, Cohen and Driscoll, on the commercial division and we'll see what the First Department has to say.

I will direct that the counsel for the moving party order the transcript of today's proceedings and present it to the clerk of Part 43 for so ordering. That so ordered transcript will be uploaded with the -- a short form gray sheet order and that will be the -- that will serve as the appealable instrument. I will have you stay on --

So, just to be clear, based upon the reasoning that I've stated, the reasoning in the decisions by Justice Cohen and the *City of Aventura Police Officers Retirement Fund versus Arison* at *70 Miscellaneous 3d 234*, which this Court adopts wholeheartedly and incorporated by reference here it is, together with the similar holding and *City of Philadelphia versus Winters* at Index Number 601438 of 2020. This is hereby ordered that the motion to dismiss is granted in its entirety. And that it is hereby ordered that the complaint is dismissed in its entirety. I will -- in as much as the Court is making a finding that the Plaintiff lacks standing to pursue the action, there is no basis even for holding the complaint alive. So accordingly the complaint is dismissed. There is no leave to replead. The court reporter has put up her e-mail address information. Do all parties see it?

LL

MS. FLATH: Yes, your Honor. Thank you.

THE COURT: Okay. So good day, everyone.

MS. FLATH: Thank you very much, your Honor.

THE COURT: Okay.

MR. BASKIN: Thank you, your Honor.

* * *

Certified to be a true and accurate transcript of the foregoing proceedings.

LATONIA LEWIS, RMR, CRR
Senior Court Reporter

SO ORDERED:

Hon. Robert R. Reed

5/4/22

LL